Petition

81-1480

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO._____

BRENT E. BOWMAN,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the failure of narcotics officers, seeking to obtain a search warrant to search a residence, to inform the Magistrate that a conspirator had provided information that the cocaine was not at the residence to be searched but was "two blocks" and "three minutes" away from the residence constituted an intentional or reckless omission of information from the issuing Magistrate, in violation of Franks v. Delaware.

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The Petitioner, Brent E. Bowman, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on September 4, 1981.

REFERENCE TO OPINION BELOW

The United States Court of Appeals for the Ninth Circuit entered its Memorandum affirming the conviction of Petitioner on September 4, 1981. A copy of the Memorandum, which is not to be reported, is attached as Appendix "A". An Order was entered on November 12, 1981, denying a Petition for Rehearing. A copy of that Order is attached hereto as Appendix "B".

JURISDICTIONAL GROUNDS

On September 4, 1981, the Court of Appeals entered a Memorandum affirming the conviction of Petitioner. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, United States Code, Section 1254(1).[1/]

1/ Other Petitioners involved herein are Louise E. Haley and Flann P. Maguire.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Fourth Amendment:

> The right of the People to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause supported by Oath or affirmation . . .

STATEMENT OF THE CASE

At approximately 8:20 on the evening of April 16, 1980, twelve to sixteen officers executed a search warrant at the 1137 Woodlake Drive residence in Cardiff by the Sea, California (R.T. 65)[2/] The warrant had been issued by the United States Magistrate at four or five o'clock that afternoon pursuant to the affidavit of Special Agent Bryan L. Cook of the Drug Enforcement Administration. (R.T. 226). The affidavit of DEA Agent Cook did not include the information provided Agent Berstler by Petitioner herein at 10:15 that morning that the cocaine was "two blocks from the house" or the information provided by Petitioner fifteen minutes thereafter to the same Agent Berstler that the half-pound of cocaine was "three minutes" from the home. (C.R. 30).

At the June 9, 1980 motion proceedings, Agent Berstler testified that the information

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2/ "R.T." refers to the Reporters Transcript and "C.R." to the Clerk's Record on appeal.

provided him by Petitioner that the cocaine was not at the residence "was not known to (him) until after the warrant had been issued" and "was told to (him) on the last phone call between (him) and Miss Haley." (R.T. 11). The last telephone call occurred at approximately 5:00 p.m., and the search warrant was issued at four or five o'clock. (C.R. 30, R.T. 226).

When called by the Government, Agent Berstler changed his prior testimony and admitted that Petitioner had provided him with the information at 10:30 a.m. but stated that he did not provide Agent Cook with the information that the cocaine was "three minutes" and "two blocks" from the house for which DEA Agent Cook was seeking the search warrant. (R.T. 109-112). However, Agent Cook testified and Agent Berstler admitted that there had been telephonic communication between the two Agents within an hour of the issuance of the search warrant. (R.T. 201-225).

The trial court held that the infor-

mation had not been withheld deliberately. (R.T. 284-289). The court below found that the decision of the district court was not clearly erroneous. (App. A). Thereafter, on November 12, 1981, Petition for Rehearing was denied. (App. B).

ARGUMENT

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE NINTH CIRCUIT IS IN CONFLICT WITH THAT OF THE EIGHTH CIRCUIT IN UNITED STATES v. STRATTON, 453 F.2d 36 (8th Cir. 1972) HOLDING THAT THE KNOWLEDGE OF ONE OFFICER IS THE KNOWLEDGE OF ALL INVOLVED IN THE INVESTIGATION AND DEBILITATES THE RATIONALE OF FRANK v. DELAWARE, 438 U.S. 154 (1978).

As this Court stated in United States v. Ventresca, 380 U.S. 102, 108 (1965), the Magistrate is required to render a judgment based on the common-sense reading of the entire affidavit requesting the issuance of the search warrant. Here the Magistrate was denied such common-sense reading since the affidavit was devoid of a most important piece of information, namely, that Petitioner Haley, the chief source of information of Agent Berstler, had informed him that the cocaine was "two blocks" and "three minutes" from the dwelling for which the search warrant was being sought. Simple logic dictates that

no Magistrate would issue a warrant to search a dwelling for cocaine where the affidavit of the DEA Agent set forth that their informant had stated a few hours earlier that the cocaine was "two blocks" and "three minutes" from the dwelling.

Likewise, it borders on absurdity to accept that experienced DEA Agents would appear before a Magistrate seeking a search warrant for a dwelling for cocaine and include in the supporting affidavit that their informant had stated that the contraband sought was "two blocks" and "three minutes" from the dwelling for which the search warrant was sought. That absurdity was removed by the simple process of non-inclusion in the affidavit of Agent Cook.

The record unequivocally reflects that Agent Berstler tried to conceal the fact that he had been provided the information prior to the issuance of the search by testifying falsely. (R.T. 11). He changed that testimony when called by the Government later. He then

admitted that he had received the "two blocks" and "three minutes" from the house from Petitioner Haley during his 10:30 a.m. telephone conversation with her and that the warrant was not issued until four or five that afternoon. (R.T. 109-112). Here also Agent Cook telephoned Agent Berstler from the office of the United States Attorney prior to his seeking the issuance of the search warrant. (R.T. 225).

The best that can be said for Agent Berstler is that he developed a bad memory, except to his absolute denial that he had failed to tell Agent Cook that the information stated the cocaine was "two blocks" and "three minutes" from the dwelling with no intent to deceive the Magistrate and cause him to issue the search warrant. Of course, the Magistrate was in fact deceived. Perhaps the Magistrate would have issued the search warrant had he been informed that the cocaine sought was "two blocks" and "three minutes" from the dwelling. That opportunity was denied the Magistrate since essential facts were not

presented prior to the issuance of the search warrant.

In United States v. Ventresca, supra, 380 U.S. at 111 (1965), this Court held that the observations of fellow officers engaged in a common investigation is a "reliable basis for a warrant applied for by one of their number." That same principle should be applied to information known to one of their number but not conveyed to the officer seeking the search warrant.

As stated by the Eighth Circuit:

> "We think the knowledge of one officer is the knowledge of all and that in the operation of an investigative or police agency the collective knowledge and the available objective facts are the criteria to be used in assessing probable cause.... The officers involved were working in close concert with each other and the knowledge of one of them was the knowledge of all." United States v. Stratton, 453 F.2d 36 at 37 (8th Cir. 1972).

This Court has held prosecuting attorneys to the same test. See, Giglio v. United States, 405 U.S. 150 (1972), where this Court disposed of nondisclosure "whether...

a result of negligence of design" by requiring that relevant information be communicated to the prosecutor involved in the case. 405 U.S. at 154. See also, Santobello v. New York, 404 U.S. 257 (1971).

To permit the withholding of information, inadvertently or otherwise, is to debilitate the rationale of Franks v. Delaware, 438 U.S. 154 (1978). Under the facts of this case the failure to disclose the information to Agent Cook should be deemed a reckless disregard, or the information not disclosed should be deemed within the collective knowledge of all Agents, including Agent Cook who provided the affidavit upon which the search warrant was issued.

CONCLUSION

For the foregoing reasons, Petitioner Brent E. Bowman respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit to resolve the questions presented herein.

DATED: January 8, 1982

Respectfully submitted,

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Attorney for Petitioner,
BRENT E. BOWMAN

PROOF OF SERVICE

I, Frank T. Vecchione, hereby declare:

I am a citizen of the United States of America, over the age of eighteen years, and not a party to the within action.

My business address is 108 Ivy Street, San Diego, California.

On January 8, 1982, I placed in an envelope with postage prepaid, a copy of PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FROM THE NINTH CIRCUIT to the following:

The Honorable Rex E. Lee
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

I declare under the penalty of perjury that the foegoing is true and correct.

Executed on this 8th day of January, 1982 at San Diego, California.

Frank T. Vecchione
FRANK T. VECCHIONE

Appendix

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. BRENT E. BOWMAN, Defendant-Appellant.	)	No. 80-1809 D.C. No. CR 80-262-3
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LOUISE R. HALEY, Defendant-Appellant.	)	No. 80-1814 D.C. No. CR 80-262-1
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. FLANN P. MAGUIRE, Defendant-Appellant.	)	No. 80-1815 D.C. No. CR 80-262-2

On Appeal from the United States District Court
for the Southern District of California
The Honorable Gordon Thompson, Jr.
District Judge, Presiding
Argued and submitted August 5, 1981

Before: ANDERSON and CHAMBERS, Circuit Judges,
BILBY,* District Judge.

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*The Honorable Richard M. Bilby, United States District Judge for the District of Arizona, sitting by designation.

APPENDIX "A"

SUFFICIENCY OF THE AFFIDAVIT

Appellants have challenged the sufficiency of the affidavit relied upon for issuance of the search warrant. They argue that material information was intentionally or recklessly withheld which, if included, would have destroyed probable cause. The district court found that the information was not intentionally or recklessly omitted. We have reviewed the record and do not find the district court's determination on this issue to have been clearly erroneous. Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978); United States v. Lefkowitz, 618 F.2d 1313 (9th Cir.), cert. denied, ____U.S.____, 101 S.CT. 86, 66 L.Ed.2d 27 (1980); United States v. Wysong, 528 F.2d 345, 348 (9th Cir. 1976).

Appellant Bowman also argues that information contained in paragraph 12 of the affidavit, regarding his prior arrest in Texas, should have been deleted because the arrest was

based upon illegally-seized evidence. He further contends that without this information the affidavit would not have established probable cause. Where, as here, the district court made no specific finding on this issue, we will uphold the district court's denial of appellant's motion to suppress if a reasonable view of the evidence will sustain it. United States v. Miner, 484 F.2d 1075, 1077 (9th Cir. 1973). Since the affidavit contained sufficient independently derived information apart from paragraph 12, we find ample support for the district court's denial of the motion to suppress.[1/]

COMPLIANCE WITH 18 U.S.C. § 3109

Appellants contend that the knock and announcement requirements of 18 U.S.C. §3109 were violated by the officers' entries at the front and side doors of the unit searched.

1/ We express no view as to the legality of Bowman's prior Texas arrest.

The district court found that the officers who entered at the front door properly knocked and announced their authority and purpose as required. The district court further found that exigent circumstances justified the side door entry. The findings of the district court on these issues are not clearly erroneous. United States v. Flickinger, 573 F.2d 1349, 1357 (9th Cir.), cert. denied, 439 U.S. 836, 99 S.Ct. 119, 58 L.Ed.2d 132 (1978); United States v. Wysong, 528 F.2d 345, 348 (9th Cir. 1976).

Because of the above dispositions, it is unnecessary for us to reach the issue of standing to challenge the legality of the search as raised by the parties to this appeal.

We have considered all other contentions raised by appellants and find them to be without merit.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. BRENT E. BOWMAN, Defendant-Appellant.	)	Nos. 80-1809 DC Nos. CR 80-262-3
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. LOUISE R. HALEY, Defendant-Appellant.	)	Nos. 80-1814 DC Nos. CR 80-262-1
UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. FLANN P. MAGUIRE, Defendant-Appellant.	)	Nos. 80-1815 DC Nos. CR 80-262-2 O R D E R

Before: ANDERSON and CHAMBERS, Circuit Judges, and BILBY,* District Judge.

The panel as constituted in the above case has voted to deny the petition for re-

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*The Honorable Richard M. Bilby, United States District Judge for the District of Arizona, sitting by designation.

hearing is denied and the suggestion for a rehearing is en banc is rejected.

Opposition

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OCTOBER TERM, 1981

BRENT E. BOWMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether law enforcement officers intentionally or recklessly withheld information from the magistrate in their application for a search warrant.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1480

BRENT E. BOWMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 14-17) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 4, 1981, and a petition for rehearing was denied on November 12, 1981. The petition for a writ of certiorari was filed on January 8, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial on stipulated facts in the United States District Court for the Southern District of California, petitioner and two others [1] were convicted of conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846 (Count 5), and possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841 (Count 6). Petitioner was sentenced to concurrent terms of seven years' imprisonment on each count, to be followed by a 10-year special parole term (R. 42).[2]

1. The stipulated evidence showed that in April 1980 Officer Berstler of the San Diego Integrated Narcotics Task Force (NTF) received information from a confidential informant regarding a woman known as Tina Haley, later identified as co-defendant Louise Haley (R. 35(A) ¶¶ 1, 17). Berstler telephoned Haley on April 14, 1980, and, pretending to be in the business of buying cocaine, discussed the possible purchase of one-half pound of cocaine. Arrangements were made for Berstler to contact Haley again the following day (R. 35(A) ¶ 4; Tr. 106-107).

After several additional telephone calls on April 15, 1980, Haley and Berstler arranged to meet that evening. Haley told Berstler that she was on her way to obtain a sample of cocaine and that she would meet Berstler at the Paddock Restaurant in Encinitas. Surveillance agents observed Haley and a male, later identified as co-defendant Burton Dodge, drive to a

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[1] On February 22, 1982, this Court denied petitions for a writ of certiorari filed by petitioner's co-defendants Louise E. Haley (No. 81-6092) and Flann Maguire (No. 81-1305).

[2] "R." refers to the record on appeal.

residential complex in Cardiff-by-the-Sea. Haley and Dodge entered the property at 1137-1143 Woodlake Drive, a four-unit condominium complex. The utilities for 1137 Woodlake Drive were listed in petitioner's name (R. 35(A) ¶¶ 1-14; Tr. 14, 16).

Haley and Dodge left the condominium complex and drove to the Paddock Restaurant, where they met Berstler and sold him a sample of cocaine. Haley informed Berstler that a half-pound of cocaine was available, but was "going fast." During this meeting, Haley and Dodge stated that their connection's name was "Brent" and that he had previously been arrested in Texas with a large amount of cocaine. They also told Berstler that "Brent" would require the purchase money prior to the delivery of the cocaine (R. 35(A) ¶¶ 15-18, 20). Arrangements were made for Berstler to purchase the one-half pound of cocaine and some "China White" heroin the following day. Haley and Dodge were then followed as they returned to 1137 Woodlake Drive (R. 35(A) ¶¶ 23-24; Tr. 195).

After his meeting with Haley on April 15, 1980, Berstler decided to seek a search warrant for petitioner's residence at 1137 Woodlake Drive. He notified Agent Cook of the Drug Enforcement Administration, who also was assigned to the NTF, of this decision, and on April 16, 1980, Cook conducted an investigation to corroborate the information that Haley had given Berstler (Tr. 196, 218-222).

On the morning of April 16, 1980, Berstler telephoned Haley at 10:15 (Tr. 195). Berstler inquired about buying the one-half pound of cocaine and confirmed that Haley's source was the same one from whom she had obtained the sample she had sold Berstler the night before. Haley made clear that her source required full payment before the sale and men-

tioned that the cocaine was "two blocks" from the source's house. She also confirmed the possibility of Berstler's purchasing a gram of heroin. Berstler told her to contact her source, find out if he would have the heroin, and call him back (R. 31 GX 2, 35(A) ¶ 25).[3]

At about 10:30 a.m., Haley called Berstler back. She confirmed that her source still had some heroin and that the half-pound of cocaine was "three minutes from his house." When Berstler pressed Haley to be sure the cocaine was at the house, she assured him that she would call her source again and Berstler said that he would call her later in the day to confirm the arrangements. They agreed that the purchase would take place that evening (R. 31 GX 3, 35(A) ¶ 26).

After the second telephone call, Berstler began to prepare for the meeting scheduled for that evening. He obtained the purchase money for the heroin and cocaine and recorded the serial numbers of the bills. He arranged to have other agents available to assist him, he secured a vehicle, and he prepared a briefing sheet. Berstler also was in state court during part of both the morning and the afternoon of April 16. On Berstler's way back to court, he saw Agent Cook briefly at about 12:30. Berstler stopped just long enough to answer affirmatively Cook's question whether he thought the meeting would take place that evening. He did not relate to Agent Cook the subject matter of the two telephone conversations he had had with Haley that morning (Tr. 196-199).

Berstler was in state court until after 4 p.m. When he returned, he continued his preparations for the meeting that evening, which included relaying to

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[3] "GX" refers to the Government's Exhibits in the record on appeal.

Agent Cook information identifying petitioner's residence that Berstler had received from surveillance agents located at the house (Tr. 198-199). At approximately 4:30, Haley telephoned Berstler to tell him that the half-pound of cocaine was ready (R. 35(A) ¶ 27).

At about 4 or 5 p.m. of that same day, Agent Cook obtained the search warrant for petitioner's residence (Tr. 226). The affidavit Cook filed in support of the application for the warrant recited the following grounds for his belief that cocaine, drug paraphernalia, and other evidence of illegal activities was then being concealed at 1137 Woodlake Drive: (1) the facts surrounding Officer Berstler's April 15 telephone conversations with Haley and his meeting with her at the Paddock Restaurant, at which she produced a sample of the cocaine that was available for purchase; (2) Agent Cook's investigation that had revealed that the utilities for 1137 Woodlake Drive were in petitioner's name and that Brent Edward Bowman had been arrested in Dallas, Texas, in possession of 262 grams of cocaine for sale; and (3) the results of a January 22, 1980, drug investigation in which a confidential informant had purchased one-quarter ounce of cocaine from Walter Kole, who apparently had just purchased the cocaine from an individual in one of the four condominiums located at 1137-1143 Woodlake Drive (R. 31 GX 1).

At approximately 5:00 p.m., Berstler telephoned Haley and arranged to meet her. Sometime after 6:15 p.m., Berstler, accompanied by Agent Goodrich, met Haley, and they agreed that Berstler and Goodrich would drive Haley to the area where her connection lived. They then proceeded to the intersection of Woodlake Drive and Evergreen Street in Encinitas (R. 35(A) ¶¶ 28-30).

Berstler asked Haley if the cocaine was at the connection's house. Haley said that her connection had shown her a plastic bag containing approximately two ounces of cocaine. Agent Goodrich then removed the money from the trunk of Berstler's car. Berstler took two Polaroid pictures of the money, gave one to Haley and told her to show her connection the picture to confirm that Berstler and Goodrich had the money for the purchase of the cocaine (R. 35(A) ¶ 31). The officers also told Haley to have her connection photograph the cocaine that Berstler and Goodrich were supposed to purchase and to bring the picture back to them. They told her that at that point they would pay over the money for the purchase of the cocaine (R. 35(A) ¶ 32).

Haley then got out of the officers' car and walked toward the connection's residence. When she returned to the car, she gave Berstler a photograph of a plastic bag containing a white, powdered substance. Haley told the officers that the white bag contained two ounces of the cocaine and that if Berstler would pay over the money for the two ounces, the rest of the cocaine would be delivered. Haley also told Berstler that the rest of the cocaine was approximately three minutes away from the connection's house. Berstler then instructed Haley to return to the residence and to have her connection move all the cocaine to his residence and photograph the entire one-half pound of cocaine. Berstler said that only then would he pay over the money for the entire eight ounces (R. 35(A) ¶¶ 32-33).

When Haley returned from petitioner's residence a second time, she told Berstler and Goodrich that the cocaine was en route to petitioner's residence and that it would arrive there in about 15 minutes. A short time later, co-defendant Flann Maguire arrived

at 1137 Woodlake Drive. He removed a package from under the hood of his car and walked toward the 1137 Woodlake Drive property (R. 35(A) ¶¶ 34, 36, 38).

Haley again approached petitioner's residence and returned to the officers' car. When she returned, she handed Berstler a picture of plastic bags and white powder on top of a scale. After receiving the photograph of what appeared to be the narcotics ordered by the officers, Berstler gave a prearranged arrest signal, and he and Goodrich arrested Haley (R. 35 (A) ¶ 40).

Other officers then executed the search warrant for 1137 Woodlake Drive, where petitioner and Maguire were arrested. At the time of his arrest, Maguire was concealing behind his back approximately eight ounces of cocaine. The officers seized an additional quantity of cocaine, narcotics paraphernalia, some with cocaine residues, and various letters, records and documents (R. 35(A) ¶¶ 41, 43-45).

2. Prior to trial, petitioner challenged the validity of the search warrant and moved to suppress the evidence seized during the search of 1137 Woodlake Drive. He argued, *inter alia*, that Officer Berstler's failure to tell Agent Cook when he saw him at 12:30 p.m. on April 16 that the half-pound of cocaine Berstler was supposed to purchase was not yet at 1137 Woodlake Drive, and Agent Cook's consequent omission of that fact from the affidavit in support of the search warrant, amounted to an intentional or reckless withholding of information from the magistrate. He further argued that inclusion of that information would have precluded a finding of probable cause and that, therefore, under *Franks* v. *Delaware*, 438 U.S. 154 (1978), any evidence seized during the search should have been suppressed.

Both Officer Berstler and Agent Cook testified at the hearing on the motion to suppress. Berstler testified that his failure to tell Agent Cook about his April 16 telephone conversations with Haley was not an attempt to deceive the magistrate. He testified that he had no particular reason for not telling Cook about the conversations except that he was in quite a hurry that day (Tr. 198-200). Specifically, Berstler explained (Tr. 200):

> I had to be in court, make the undercover phone call, and I had to be in court again. I had a lot of things on my mind. I didn't tell him anything because I felt that if he could obtain the search warrant, he could obtain the search warrant. If he couldn't and had called me back for information in regard to the last phone call, I probably at that time would have remembered and told him.

Following the hearing and argument, the district court ruled that petitioner had satisfied neither of the two prongs of the *Franks* v. *Delaware* test (Tr. 284-288). The court first found that Berstler had neither intentionally nor recklessly withheld from the magistrate the information given him by Haley for the purpose of "securing [a] warrant that he knew he could otherwise not secure" (Tr. 284; see also Tr. 285-286, 288). In any event, the court held, there "would have been [probable cause] even had the magistrate been informed of [Haley's] comment that the half pound was not at the house but was two blocks away and/or three minutes away" (Tr. 288; see also Tr. 286-287).

The court of appeals upheld the district court's determination on the *Franks* v. *Delaware* issue as not clearly erroneous and affirmed petitioner's conviction (Pet. App. 14-17).

ARGUMENT

Petitioner contends (Pet. 7-11) that Officer Berstler intentionally or recklessly failed to tell Agent Cook and, by extension, the magistrate, that the one-half pound of cocaine was not at 1137 Woodlake Drive at the time Cook applied for the warrant and that, therefore, under *Franks* v. *Delaware*, 438 U.S. 154 (1978), the search warrant should not have been issued and the evidence seized during its execution should have been suppressed.

1. Both courts below reviewed the record in this case and concluded that Berstler's actions did not demonstrate either intentional or reckless withholding of information from the magistrate. That fact-bound question does not warrant further consideration by this Court. See *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967). Moreover, a review of the events of April 15 and 16, 1980, fully supports the finding that the reason Berstler did not inform Cook that the particular half-pound of cocaine Berstler was to purchase had not yet been delivered to petitioner's residence was because Berstler deemed that fact inconsequential in view of his belief that petitioner was, in any event, dealing cocaine from his residence and that cocaine was, therefore, maintained at that address.

Berstler directed Cook to attempt to obtain a search warrant for petitioner's residence after Berstler's meeting with Haley on the evening of April 15, 1980. At that time, Berstler had ample reason to believe that cocaine was located at petitioner's residence because, prior to the meeting, Haley had told Berstler that she was on her way to pick up the sample, and

she had been followed from her residence to the complex in which petitioner's condominium was located and from there to the meeting with Berstler, at which she delivered the sample to him (R. 35(A) ¶¶ 13-15). Haley's subsequent representations of mid-morning April 16—that the particular half-pound of cocaine intended for Berstler was located "two blocks" or "three minutes" away from petitioner's residence—did not detract from the probability that other cocaine was located at petitioner's home.[4] Rather, the thrust of both the April 16 morning telephone conversations between Berstler and Haley was simply to make arrangements for all the cocaine to be at the appointed place—1137 Woodlake Drive—before their meeting that evening.

Officer Berstler was very busy on April 16, 1980. In addition to making preparations for that evening's transaction, he had commitments in state court for most of the day. Under these circumstances, his

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[4] As Berstler testified under cross-examination (Tr. 215), "I was convinced there was cocaine in the house. The amount I was not sure of. We had made a purchase the evening before when Miss Haley went to that residence and brought me cocaine."

Petitioner attempts to rely (Pet. 4-5, 8-9) on the fact that at a prior hearing in this case Officer Berstler testified that Haley had not told him until after the warrant had issued that the entire half-pound of cocaine intended for him was not yet at petitioner's residence (Tr. 11). Whatever discrepancy there may be concerning when Berstler first became aware that *the particular half-pound intended for him* was not at petitioner's residence, however, the significant fact is that at all relevant times there was reason to believe, which Berstler did, that *some* cocaine was located at the Woodlake residence (Tr. 11, 215).

failure to tell Agent Cook that at 10:30 a.m. the half-pound of cocaine that he was to purchase was not yet at 1137 Woodlake Drive, a fact which he considered to be of no consequence, cannot be deemed either an intentional or a reckless withholding of information.

2. Furthermore, the district court found that even if the magistrate had known that the half-pound of cocaine had not yet been moved to petitioner's residence, that information would not have defeated the showing of probable cause. According to the affidavit, investigations of the Narcotics Task Force had in January 1980 identified a cocaine sale originating from the four-unit condominium complex in which petitioner's residence was located. The sample Haley sold to Berstler on the evening of April 15, 1980, also had come from that location. A reasonable inference from that evidence was that, even apart from the anticipated sale to Berstler, petitioner maintained cocaine at his residence.[5]

Petitioner has failed to shoulder his burden of showing either that Officer Berstler intentionally or recklessly withheld information or that the presence of the information would have affected the magistrate's decision to issue the search warrant. The decisions of the courts below are consistent with *Franks* v. *Delaware* and do not require further review by this Court.

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[5] That inference was confirmed by Haley's first proffer of two ounces of cocaine before co-defendant Maguire arrived with the balance intended for Berstler.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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